

Judge Stanley A. Bastian

Stephen G. Skinner, WSBA #17317  
Karleen J. Scharer, WSBA #48101  
ANDREWS SKINNER, P.S.  
645 Elliott Ave. W., Suite 350  
Seattle, WA 98119  
Telephone: 206-223-9248  
Stephen.skinner@andrews-skinner.com  
Karleen.scharer@andrews-skinner.com

Attorneys for Defendants

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON  
AT YAKIMA DIVISION

KENNETH KLUTH, and STEPHEN  
SCHENK,

Plaintiffs,

vs.

SANTANDER CONSUMER USA  
INC., and AUTO TRACKERS AND  
RECOVERY NORTH, LLC,

Defendants.

Case No: 1:17-cv-03149-SAB

DEFENDANT SANTANDER  
CONSUMER USA INC.'S MOTION  
FOR PARTIAL SUMMARY  
JUDGMENT

**NOTE ON MOTION CALENDAR:**  
**May 30, 2018**  
**Without Oral Argument**

Defendant Santander Consumer USA Inc. ("SC"), by and through its attorneys,  
respectfully requests the Court grant its Motion for Partial Summary Judgment  
pursuant to Fed. R. Civ. P. 56 and LR 56.1, and dismiss Plaintiffs' causes of action for

1 violation of Washington's Uniform Commercial Code and Washington's Consumer  
2 Protection Act. Along with its Statement of Material Facts<sup>1</sup>, SC submits as follows:

3  
4 **I. INTRODUCTION**

5 Plaintiffs bring this action against defendants SC and Auto Trackers and  
6 Recovery North, LLC regarding the repossession and sale of their vehicle after they  
7 defaulted under the terms of the financing agreement. Plaintiffs allege that SC failed  
8 to send a reasonable authenticated notification of disposition of the vehicle and a  
9 written explanation of the deficiency balance to Schenk, and therefore violated  
10 Revised Code of Washington ("RCW") 62A.9A-611(b), 62A-9A-614, and 62A.9A-  
11 616. In addition, Plaintiffs claim SC violated the Washington Consumer Protection  
12 Act as a result of the failure to send the notices.  
13  
14  
15  
16  
17

18 <sup>1</sup> Plaintiffs' deposition was set for April 2, 2018. On the morning of April 2, 2018,  
19 Plaintiffs' counsel unilaterally postponed the deposition due to illness. In order to  
20 avoid further delay and because the summary judgment deadline is April 10, 2018,  
21 SC submits its Motion for Partial Summary Judgment and Statement of Material  
22 Facts absent Plaintiffs' deposition testimony. However, SC will include the  
23 deposition testimony as appropriate in a Statement of Material Facts accompanying  
24 its Reply to any opposition filed by Plaintiffs.  
25  
26

1 As an initial matter, it is undisputed that SC sent both a “Notice of Our Plan to  
2 Sell Property” (“Notice”) and “Explanation of Calculation of Surplus or Deficiency”  
3 (“Explanation”) to both Plaintiffs via U.S. mail. MF ¶¶ 4-6, 17-19. The law is clear  
4 that notice is effective, provided the creditor acted reasonably in trying to send the  
5 notice, even if the notice is not received. Here, not only is it undisputed that SC mailed  
6 both the Notice and Explanation to both Plaintiffs, Kluth acknowledged receiving both  
7 documents from SC. MF ¶¶ 6, 19. Further, Plaintiffs lived together when the Notice  
8 and Explanation were sent, so Schenk cannot reasonably dispute that he was aware of  
9 them. *Id.* at ¶ 7.

12 To the extent Plaintiffs allege the Notice and Explanation fail to include the  
13 required information, their claim fails, as both documents contain all of the statutorily-  
14 required disclosures. MF ¶¶ 8-16, 20-23. In addition, to the extent Plaintiffs base their  
15 cause of action for violation of the Washington Consumer Protection Act on SC’s  
16 purported failure to send the Notice and Explanation to Schenk, their claim fails for  
17 the same reasons set forth above.

20 SC requests that the Court grant partial summary judgment in its favor as to  
21 Plaintiffs’ second and third causes of action as they relate to the provision of notice  
22 pursuant to RCW 62A.9A-611(b), 62A-9A-614, and 62A.9A-616.

## 25 II. STATEMENT OF ISSUES

- 1 1. Whether summary judgment is appropriate with respect to Plaintiffs' claim for  
2 violation of the UCC when (1) the Notice and Explanation were mailed to  
3 Plaintiff; (2) the Notice complied with RCW 62A.9A-614 and 62A.9A-613; and  
4 (3) the Explanation complied with RCW 62A.9A-616?
- 5 2. Whether summary judgment is appropriate with respect to Plaintiffs' claim for  
6 violation of Washington's Consumer Protection Act when Plaintiffs' claim is  
7 based on violations of the UCC related to the Notice and/or Explanation and  
8 they cannot demonstrate that either the Notice of the Explanation was deficient  
9 in form or mailing?

### 10 **III. EVIDENCE RELIED UPON**

11 SC relies upon and incorporates by reference the accompanying Statement of  
12 Material Facts in Support of SC's Motion for Summary Judgment ("MF"); the  
13 Declaration of Jodie Kelch and the exhibits attached thereto; the Declaration of  
14 Karleen J. Scharer and the exhibits attached thereto; and the pleadings and files herein.

### 15 **IV. AUTHORITY**

#### 16 **A. Summary Judgment Standard.**

17 Summary judgment is appropriate if the pleadings, discovery, and affidavits  
18 demonstrate there is no genuine issue of material fact and that the moving party is  
19 entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323  
20 (1986) (citing Fed. R. Civ. P. 56(c)). There is no genuine issue for trial unless there is  
21 sufficient evidence favoring the nonmoving party for a jury to return a verdict in that  
22 party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The moving  
23 party has the burden of showing the absence of a genuine issue of fact for trial. *Celotex*,

1 477 U.S. at 325; *see also Fair Hous. Council v. Riverside Two*, 249 F.3d 1132, 1136  
 2 (9th Cir. 2001).

3 The moving party must also show it is entitled to judgment as a matter of law.  
 4  
 5 *Smith v. Univ. of Wash. Law School*, 233 F.3d 1188, 1193 (9th Cir. 2000). The moving  
 6 party is entitled to judgment as a matter of law when the non-moving party fails to  
 7 make a sufficient showing on an essential element of a claim on which the non-moving  
 8 party has the burden of proof. *Celotex*, 477 U.S. at 323. The non-moving party cannot  
 9 rely on conclusory allegations alone to create an issue of material fact. *Hansen v.*  
 10 *United States*, 7 F.3d 137, 138 (9th Cir. 1993).  
 11  
 12

13 **B. Plaintiffs' UCC Claim Fails as a Matter of Law as SC Provided the**  
 14 **Requisite Notices to Plaintiffs.**

15 **1. SC Mailed the Requisite Notice and Explanation to**  
**Plaintiffs.**

16 Plaintiffs' second cause of action<sup>2</sup> alleges that SC did not comply with RCW  
 17 62A-9A-611(b) and 62A.9A-614 because it failed to send a reasonable authenticated  
 18  
 19

20 \_\_\_\_\_  
 21 <sup>2</sup> To the extent Plaintiffs' second cause of action is asserted by both Kluth and  
 22 Schenk, the claims for violation of RCW 62A-9A-611(b), 62A.9A-614 and 62A.9A-  
 23 616 fail as to Kluth as he has acknowledged receiving both the Notice and  
 24 Explanation. Defendant SC's Statement of Material Facts ("MF") ¶¶ 6, 19.  
 25  
 26 Accordingly, Kluth cannot prevail as a matter of law for these alleged violations.

1 notification of disposition to Schenk. Compl. ¶ 21. In addition, Plaintiffs claim SC  
2 violated RCW 62A.9A-616 by failing to send a written explanation of the deficiency  
3 balance or surplus to them after it sold the vehicle. *Id.* at ¶ 22. However, SC met  
4 the statutory requirements as it mailed the “Notice of Our Plan to Sell Property”  
5 (“Notice”) and “Explanation of Calculation of Surplus or Deficiency” to both  
6 Plaintiffs. MF ¶¶ 4-6, 17-19. In addition, SC acted reasonably in attempting to mail  
7 the Notice and Explanation to Plaintiffs. Further, as Plaintiffs resided at the same  
8 address as of January 17, 2017 and Kluth acknowledged receiving the Notice and  
9 Explanation at that address, Schenk had reason to know of the existence of both the  
10 Notice and Explanation after Kluth received them. MF ¶¶ 6-7. In fact, at no point  
11 do Plaintiffs allege that Schenk lacked knowledge of the Notice or Explanation, only  
12 that the documents were not mailed to him.

13  
14  
15  
16  
17 The Uniform Commercial Code requires a creditor that disposes of  
18 repossessed collateral to send notification of the planned disposition to the debtor.  
19 RCW 62A.9A-611(b); *Rotta v. Early Indus. Corp.*, 47 Wn. App. 21, 24, 733 P.2d  
20 576 (1987). RCW 62A.9A-616 requires that an explanation be sent to the debtor  
21 stating the amount of the surplus or deficiency and an explanation of how the surplus  
22 or deficiency was calculated, along with other information.

23  
24  
25 A person gives notification to another “by taking such steps as may be  
26 reasonably required to inform the other in ordinary course, whether or not the other

1 person actually comes to know of it.” RCW 62A.1-202(d). Consequently, notice  
 2 may be effective even though it is not received if the creditor acted reasonably in  
 3 trying to send notice. 27 MARJORIE D. ROMBAUER, WASHINGTON  
 4 PRACTICE: CREDITORS' REMEDIES—DEBTORS' RELIEF, § 3.126 at 273  
 5 (1998).  
 6

7 The Uniform Commercial Code defines “send” as follows:  
 8

9 “Send” in connection with any writing or notice means: (A) to deposit  
 10 in the mail or deliver for transmission by any other usual means of  
 11 communication with postage or cost of transmission provided for and  
 12 properly addressed and, in the case of an instrument, to an address  
 13 specified thereon or otherwise agreed, or if there be none to any address  
 14 reasonable under the circumstances; or (B) in any other way to cause to  
 15 be received any record or notice within the time it would have arrived  
 16 if properly send.

17 RCW 62A.1-201(b)(36). In addition, RCW 62A.1-202(a) provides that a person has  
 18 notice if they have actual knowledge or if from all facts and circumstances known  
 19 to the person at the time in question, he has reason to know that it exists. Finally,  
 20 the purpose of the notification requirement of RCW 62A.9A-611(b) is to provide the  
 21 consumer a chance to redeem the property. *Swanson v. May*, 40 Wn. App. 148, 155,  
 22 697 P.2d 1013 (1985).

23 Here, it is undisputed that SC mailed the Notice to Kluth and Schenk on or  
 24 about January 17, 2017. MF ¶ 4. The Notice was mailed to Kluth at 2700 Fruitvale  
 25 Blvd., Unit 8, Yakima, WA 98902-1148 and to Schenk at General Delivery, Yakima,  
 26

1 WA 98903. MF ¶ 5. Plaintiffs acknowledge that SC mailed the Notice to Kluth.  
2 MF ¶ 6. Further, Plaintiffs stated that Schenk lived at 2700 Fruitvale Blvd., Unit 8,  
3 Yakima, WA as of January 17, 2017. MF ¶ 7. SC also mailed the Explanation to  
4 Kluth and Schenk on or about April 2, 2017. MF ¶ 17. The Explanation was also  
5 mailed to Kluth at 2700 Fruitvale Blvd., Unit 8, Yakima, WA 98902-1148 and to  
6 Schenk at General Delivery, Yakima, WA 98903. MF ¶ 18. Plaintiffs again  
7 acknowledge that SC mailed the Explanation to Kluth. MF ¶ 19.  
8  
9

10 These undisputed facts reflect that SC sent the Notice to both Kluth and  
11 Schenk on or about January 17, 2017 and that SC sent the Explanation to both Kluth  
12 and Schenk on or about April 2, 2017. MF ¶¶ 4-5, 17-18. Pursuant to RCW 62A.1-  
13 202(d), SC took reasonable steps to inform both Kluth and Schenk of the Notice and  
14 Explanation by mailing a copy of each document to both of them. Notification of  
15 the Notice and Explanation was effective once the documents were mailed by SC to  
16 Plaintiffs. RCW 62A.9A-610(a). Because actual receipt by Schenk of the Notice  
17 and Explanation is not required for the notifications to be effective, the undisputed  
18 fact that SC mailed the documents to Plaintiffs, requires a finding, as a matter of law,  
19 that SC complied with its statutory obligation to send these documents. For this  
20 reason alone, summary judgment in SC's favor is warranted.  
21  
22  
23  
24

25 Summary judgment is also appropriate, however, because Schenk had actual  
26 or constructive notice of the disclosures. It is undisputed that Kluth and Schenk



1 lived together at the time SC mailed the Notice and Explanation, and Plaintiffs  
2 acknowledge that Kluth received both the Notice and Explanation at the address SC  
3 used on the mailings. MF ¶¶ 6-7, 19. RCW 62A.1-202(a) provides that a person  
4 has notice if they have actual knowledge or reason to know the notice exists. Here,  
5 Plaintiffs lived together and Schenk does not deny that he had actual knowledge of  
6 the Notice and Explanation. Because Schenk either knew or had reason to know of  
7 the Notice and Explanation, the Court should grant summary judgment with respect  
8 to Plaintiffs' second cause of action.  
9

10  
11 In sum, SC satisfied the statutory requirements pursuant to RCW 62A.9A-  
12 611(b) by sending the Notice and Explanation to both Kluth and Schenk. Whether  
13 or not Schenk received the mailings is immaterial as to SC's compliance with the  
14 statute as SC took "such steps as may be reasonably required to inform" both Kluth  
15 and Schenk in the ordinary course regarding the Notice and Explanation. RCW  
16 62A.1-202(d). Further, SC's reasonable steps resulted in actual or constructive  
17 notice to Kluth of both the Notice and Explanation. Plaintiffs have offered no  
18 evidence to the contrary.  
19  
20  
21

22 Accordingly, the Court should grant summary judgment in favor of SC as to  
23 Plaintiffs' second cause of action for violation of RCW 62A.9A-611(b), 62A-9A-  
24 614, and 62A.9A-616.  
25  
26

**2. The Notice Met the Requirements of RCW 62A.9A-614.**

The basis for Plaintiffs' claim under this statute is not entirely clear. To the extent Plaintiffs contend that SC simply failed to send the Notice to Schenk, their contention fails for the reasons stated above. Plaintiffs' claim fares no better, however, if they are claiming that the Notice failed to include the required disclosures. As discussed below, the contents of the Notice met all applicable statutory requirements, and summary judgment on Plaintiffs' claim under this statute should be granted.

Pursuant to RCW 62A.9A-614(1), a notification of disposition must provide: (1) the information specified in RCW 62A.9A-613(1); (2) a description of any liability for a deficiency for the person who is being sent the notice; (3) a telephone number for the person to contact the secured party to determine the amount necessary to redeem the collateral; and (4) a telephone number or mailing address from which additional information concerning the disposition and obligation secured is available. RCW 62A.9A-613(1) requires: (1) a description of the debtor and secured party; (2) a description of the collateral that is subject to disposition; (3) the method of intended disposition; (4) a statement that the debtor is entitled to an accounting of the unpaid indebtedness and states the charge for such an accounting; and (5) the time and place of a public disposition or time after which any other disposition is to be made.

1 Here, Plaintiffs cannot reasonably dispute that the Notice met all of the  
2 requirements of RCW 62A.9A-614(1) and 62A.9A-613(1). The Notice identified  
3 the debtors as Kluth and Schenk, and the secured party as SC. MF ¶ 8. Further, the  
4 Notice described the collateral as the 2013 Ford F150 with VIN  
5 1FTFX1EF5DFA80276. MF ¶ 9. The Notice stated that SC was going to dispose  
6 of the Vehicle via private sale after January 30, 2017, identifying the time, place and  
7 method of disposition. MF ¶¶ 10, 12. The Notice also stated that if Plaintiffs want  
8 SC “to explain to [Plaintiffs] in writing how [SC] figured out the amount that”  
9 Plaintiffs owed, they could contact SC via telephone or mail for an accounting of the  
10 charges for the account. MF ¶ 11. The Notice also provided a telephone number for  
11 Plaintiffs to contact SC to determine the exact amount to be paid to redeem the  
12 Vehicle from SC and to obtain more information regarding the sale of the Vehicle.  
13 MF ¶¶ 14-15. Finally, the Notice set forth that Plaintiffs would be liable for any  
14 deficiency on the account after the proceeds from the sale of the Vehicle were  
15 applied to the account. MF ¶ 13. In sum, all of the statutory requirements for a  
16 notice of disposition were met by SC’s January 17, 2017 Notice.

17 Accordingly, the Court should grant summary judgment in favor of SC as to  
18 Plaintiffs’ second cause of action, to the extent it alleges that the Notice failed to  
19 provide the statutorily required information.  
20  
21  
22  
23  
24  
25  
26

1                   **3. The Explanation Met the Requirements of RCW 62A.9A-**  
2                   **616.**

3                   In their Complaint, Plaintiffs allege that “Defendants violated RCW § 62A.9A-  
4 616 by failing to send written explanations of the deficiency balance or surplus to  
5 Plaintiffs, after selling their vehicle.” *Dkt. No. 1*, p. 4:11-13. As an initial matter,  
6 Plaintiffs concede that Kluth received the Explanation. MF ¶ 19. As discussed  
7 above, SC mailed the Explanation to Schenk, and in any event, Schenk had actual or  
8 constructive knowledge of the Explanation. MF ¶ 18. Finally, and as discussed  
9 below, Plaintiffs cannot reasonably contend that the contents of the Explanation  
10 failed to meet any statutory requirements. For these reasons, summary judgment is  
11 warranted.  
12

13  
14                   Pursuant to RCW 62A.9A-616, an explanation of calculation of surplus or  
15 deficiency means a writing that: (1) states the amount of the surplus or deficiency; (2)  
16 provides an explanation of how the secured party calculated the surplus or deficiency;  
17 (3) states that “future debits, credits, charges, including additional credit service  
18 charges or interest, rebates, and expenses may affect the amount of the surplus or  
19 deficiency”; and (4) provides a telephone number or mailing address from which to  
20 request additional information regarding the transaction.  
21  
22

23  
24                   Here, the Explanation met all of the requirements of RCW 62A.9A-616. The  
25 Explanation set forth the amount of the deficiency, \$8,960.49, owed by Plaintiffs. MF  
26

¶ 20. The Explanation provided a breakdown of how the deficiency was calculated. MF ¶ 21. Further, the Explanation stated that “[f]uture debits, credits, charges, finance charges or interest, rebates or other expenses may affect this amount.” MF ¶ 22. Finally, the Explanation provided a telephone number and address for Plaintiffs to contact SC regarding more information about the transaction. MF ¶ 23. In short, the Explanation contained all of the statutorily required information for an explanation of calculation of surplus or deficiency.

Accordingly, the Court should grant summary judgment in favor of SC as to Plaintiffs’ second cause of action, to the extent it alleges that the Explanation failed to provide the statutorily required information.

**C. Plaintiffs’ CPA Claim Fails as a Matter of Law to the Extent it is Based on the Notice or Explanation.**

Plaintiffs’ third cause of action for violation of the Washington Consumer Protection Act (“CPA”) broadly alleges that SC committed unfair methods of competition and/or deceptive acts or practices, in the conduct of any trade or commerce. *Dkt. No. 1*, p. 4:27 – 5:2. Plaintiffs allege that SC’s conduct violated RCW 19.86.020 and was injurious to the public interest in violation of RCW 19.86.093. *Id.* at 5:3-7. However, Plaintiffs do not allege what specific conduct by SC violated the CPA. To the extent Plaintiffs base their CPA claim on SC’s alleged failure to provide the Notice or Explanation to Schenk, it fails as a matter of law for the reasons stated

1 above. *See supra* Section B, parts 1-3. Because SC provided the requisite Notice and  
2 Explanation, its alleged failure to do so cannot serve as a basis for a CPA claim.

3 To establish that SC's actions injured the public interest, Plaintiffs must  
4 establish that the actions: "(1) Violates [a statute within the CPA]; (2) Violates a statute  
5 that contains a specific legislative declaration of public interest impact; or (3)(a)  
6 Injured other persons; (b) had the capacity to injure other persons; or (c) has the  
7 capacity to injure other persons." RCW 19.86.093. With respect to Plaintiffs' second  
8 cause of action regarding the provision of the Notice and Explanation to Schenk, they  
9 cannot establish a violation of a statute within the CPA or a statute that contains a  
10 specific legislative declaration of public interest impact. Further, Plaintiffs cannot  
11 establish that SC's actions regarding the provision of the Notice and Explanation  
12 injured other persons, had the capacity to injure other persons or has the capacity to  
13 injure other persons. To the extent Plaintiffs' third cause of action for acts injurious to  
14 the public interest is based on the provision of the Notice and Explanation to Schenk,  
15 summary judgment should be granted in favor of SC.  
16  
17  
18  
19  
20

21 Accordingly, to the extent Plaintiffs' third cause of action against SC is based  
22 on conduct related to the provision of the Notice and Explanation to Schenk, the Court  
23 should grant summary judgment in favor of SC.  
24

## 25 V. CONCLUSION

1 SC respectfully requests the Court grant its Motion for Partial Summary  
2 Judgment as to Plaintiffs' Complaint regarding Plaintiffs' second and third causes of  
3 action, as set forth above.

4  
5 DATED this 10<sup>th</sup> day of April, 2018.

6 ANDREWS ▪ SKINNER, P.S.

7  
8 By s/ Karleen J. Scharer

9 STEPHEN G. SKINNER, WSBA #17317

10 KARLEEN J. SCHARER, WSBA #48101

11 645 Elliott Ave. W., Ste. 350

12 Seattle, WA 98119

13 Tel: 206.223.9248 | Fax: 206.623.9050

14 [Stephen.skinner@andrews-skinner.com](mailto:Stephen.skinner@andrews-skinner.com)

15 [Karleen.scharer@andrews-skinner.com](mailto:Karleen.scharer@andrews-skinner.com)

16 Attorneys for Defendants Santander

17 Consumer USA Inc. and Auto Trackers and

18 Recovery North, LLC

**CERTIFICATE OF SERVICE**

I hereby certify that on April 10, 2018, I electronically filed the foregoing with the Clerk of the court using the CM/ECF system, which sent notification of such filing to the following individuals:

Alexander Trueblood  
Trueblood Law Firm  
1700 Seventh Ave., Suite 2100  
Seattle, WA 98101  
*Attorneys for Plaintiffs*

ANDREWS ▪ SKINNER, P.S.

By s/ Karleen J. Scharer  
STEPHEN G. SKINNER, WSBA #17317  
Karleen J. Scharer, WSBA #48101  
645 Elliott Ave. W., Ste. 350  
Seattle, WA 98119  
Tel: 206.223.9248 | Fax: 206.623.9050  
[Stephen.skinner@andrews-skinner.com](mailto:Stephen.skinner@andrews-skinner.com)  
[Karleen.scharer@andrews-skinner.com](mailto:Karleen.scharer@andrews-skinner.com)  
Attorneys for Defendants Santander  
Consumer USA Inc. and Auto Trackers and  
Recovery North, LLC